(15,204.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 186.

T. M. MONTGOMERY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

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1 *Indictment.*

THE UNITED STATES OF AMERICA, *ss:*

The Circuit — of the United States, Eastern District of Tennessee, Southern Division, April Term, 1890.

THE UNITED STATES
vs.
T. M. MONTGOMERY.

The grand jurors for the United States of America and district and division aforesaid, *have* been duly elected, summoned, empanelled, sworn, and charged to inquire for the body of the said district and division, upon their oaths present:

That — the 8th day of March, 1890, within the district and division aforesaid, T. M. Montgomery, being then employed in the postal service of the United States as a railway postal clerk or route agent on the railway mail route between Chattanooga, Tennessee, and Bristol, Tennessee, — unlawfully, feloniously, and knowingly embezzle, secrete, and steal one letter dated Benhams, Va., March 6, 1890, addressed to M. A. Dauphin, New Orleans, La., and signed Thos. N. O'Keeffe, and containing two one-dollar United States silver certificates, to wit:

$1 U. S. silver certificate, letter B; B. 13957621, series 1886; private mark, ⊙;

$1 U. S. silver certificate, letter C; B. 314923351, series 1886; private mark, ⊙;

Which had come into his possession on account of his said employment and while he was employed in the discharge of the duties thereof, and which had been deposited in the mail, as stated

2 heretofore, and intended to be conveyed in the mail and delivered to the person to whom it was addressed, by the agents and employés of the Post Office Department, having been for that purpose forwarded through and deliv-ed from a post-office established by authority of the Postmaster General, to wit, the post-office at Bristol, Tennessee, all contrary to the statutes in such cases made and provided and against the peace and dignity of the United States.

And the grand jurors aforesaid upon their oaths aforesaid further present:

That on the 9th day of March, 1890, within the district and division aforesaid, the said T. M. Montgomery, being then and there employed as a railway postal clerk in the Bristol and Chattanooga railway post-office, did then and there secrete, embezzle, and steal from the mail the following-described letters which had been entrusted to him and which had come into his possession, to be conveyed by mail and to be delivered to the persons addressed, the same having first been deposited in a post-office of the United States established by authority of the Postmaster General of the United States, and

which contained sundry pecuniary obligations and securities of the United States Government, to wit:

One letter dated Bristol, Tenn., March 7, 1890, addressed to New Orleans National bank, New Orleans, La., and signed Jas. M. Thompson, and containing two dollars in United States currency;

One letter dated Bristol, Tenn., March 7, 1890, addressed to M. A. Dauphin, New Orleans, La., and signed Barton H. Grundy, and containing three dollars in United States currency;

One letter dated Osborn's Ford, Va., March 5, 1890, addressed to M. A. Dauphin, New Orleans, La., and signed Wm. H. Beveridge, and containing two dollars in United States currency;

3 One letter dated Benhams, Va., March 6, 1890, addressed to M. A. Dauphin, New Orleans, La., and signed S. C. Jones, and containing two dollars in United States currency;—

One letter dated Flat Woods, Va., March 5, 1890, and addressed to M. A. Dauphin, New Orleans, La, and signed J. L. Hill, and containing two dollars in United States currency,

Contrary to the statutes made and provided and against the peace and dignity of the United States.

H. B. LINDSAY,
United States Att'y.

Endorsed: No. #1379. Circuit court of the United States, eastern district of Tennessee, southern division. Indictment for violation — postal laws. The United States *vs.* T. M. Montgomery. Witnesses: S. T. Hooten, G. W. Wilde, A. G. Sharpe, —— Phillips, called and sworn by me to testify before the grand jury this 11th day of April, 1890, and on whose testimony this indictment was found. A true bill. J. S. Matthews, foreman grand jury. Filed 1890, Apr. 11th. Henry O. Ewing, deputy clerk Bradley county.

Affidavit.

THE UNITED STATES *vs.* T. M. MONTGOMERY. } No. 1379. Violating Postal Laws.

In this cause personally comes the defendant, T. M. Montgomery, who makes oath and says he cannot go safely to trial for want of the testimony of —— Everett (a member of the firm of J. H. Ev-

4 erett & Sons and a son of J. H. Everett, but given name cannot be accurately given by affiant), a citizen and resident of the State of Virginia; that he is a material witness on behalf of affiant and he expects to have him here at the next term of the court, and can prove by no other witness, as he is advised, the same facts he expects to establish by said Everett. He expects to prove by said Everett that this affiant obtained of him, said Everett, two bills of United States currency found on affiant's person at time of his arrest, and which was attempted to be shown and is alleged, as he is advised, to be identified by witnesses for the Government as money embezzled by this affiant, as charged in the indictment; that this

currency was obtained by affiant *bona fide* from said Everett in change but a short time before his arrest, as affiant expects to prove by said Everett; that he has a letter, under the letter-head of "J. H. Everett & Sons," informing this affiant that the son of J. H. Everett would so state the facts in the case as set out herein.

Affiant further shows that he was arrested on Sunday, March 9, 1890, and on same day held to answer by the commissioner: that he had no counsel present to represent him at said alleged hasty hearing; that the commissioner did not, as he — advised, and has not made or reduced to writing any of the evidence or statements of the witnesses against this affiant, and his attorneys — unacquainted, therefore, with the grounds or facts of the case as claimed by the Government; that the bill of indictment against this affiant was only returned into court on the 11th of April, 1890, in the afternoon of that day, and affiant — no time to prepare properly for his defense; that in view of these facts — what he expects to prove by said witnesses and the gravity of said charge against this affiant — he prays that said cause be continued until next term; this he asks not for delay, but that justice may be done.

T. M. MONTGOMERY.

Sworn to and subscribed before me Ap'l 12, 1890.

HENRY O. EWING, *Dept. Cl'k.*

Endorsed: Filed this 12th day of April, 1890. Henry O. Ewing, deputy clerk.

Bond.

THE UNITED STATES
vs.
T. M. MONTGOMERY.

Know all men by these presents that we, T. M. Montgomery, ——, ——, are held and firmly bound unto the United States, as follows: The said T. M. Montgomery, in the sum of one thousand dollars, and the said J. T. Rogers and John Trunk, jointly and severally, in the sum of one thousand dollars, to be levied of our goods and chattles, lands and tenements, to the use of the United States; yet to be void if the above-bound T. M. Montgomery shall make his personal appearance before the circuit court of the United States for the eastern district of Tennessee, at Chattanooga, on the first Monday of April, 1891, in answer to a charge of the United States exhibited against him by indictment for violation of —, and does not depart without leave of said court.

Witness our hands and seals this 14th day of October, 1890.

T. M. MONTGOMERY. [SEAL.]
JNO. T. ROGERS. [SEAL.]
JOHN TRUNK. [SEAL.]

Acknowledged and subscribed before me this 14th day of October, 1890, and approved.

J. C. TIPTON,
U. S. Commissioner.

Endorsed: No. # 1379. Bond. The United States *vs.* T. M. Montgomery. Com'r, J. C. Tipton.

Costs:

Bond	30c.
Acknowl'm'nts at 25c	50
	80

Filed 15 day of Oct., 1890. Henry O. Ewing, deputy clerk.

Petition for Writ of Error.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee.

To the honorable Chief Justice and associate justices *at* the Supreme Court of the United States:

And now comes Thomas M. Montgomery and complains that in the records and proceedings and also in the rendition of judgment in the cause of The United States *vs.* Thomas Montgomery, tried in the circuit court of the United States for the southern division of the eastern district of Tennessee, at the April term of 1892 thereof, manifest error hath intervened, to the great damage of said Thomas M. Montgomery, as shown in and by an assignment of errors hereto attached.

7 Wherefore petitioner prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

Petitioner prays that he may be admitted to bail, as prescribed by the rules of this court, citation having already been returned, duly served upon, as acknowledged by the district attorney.

Petitioner also prays for a supersedeas to supersede the execution of sentence pending the writ of error herein prayed.

And he will ever pray, &c.

THOMAS M. MONTGOMERY,
By his attorney, LEWIS SHEPHERD.

Endorsed: No. # 1379. In the U. S. circuit court at Chattanooga. United States *vs.* T. M. Montgomery. Petition for writ of error. Filed 14th day of April, 1892. Henry O. Ewing, deputy clerk.

Assignment of Errors.

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

THE UNITED STATES
vs.
THOMAS M. MONTGOMERY.

Assignment of errors.

And now comes the said Thomas M. Montgomery and says that in the records and proceedings in the above-entitled cause there is manifest error in this, to wit:

First. That the court refused to charge the jury, as requested by the defendant's counsel, that as the letters taken were mailed for the purpose of entrapping defendant into the commission of a crime, there could be no conviction of the defendant for the taking of said letters.

8 Second. Because the court refused to charge the jury, as requested by defendant's counsel, that there was a fatal variance between the indictment and the proof in respect to the description of the letters for the stealing or embezzlement of which the defendant was indicted.

Wherefore the said defendant prays that the judgment of the circuit court of the United States for the southern division of the eastern district of Tennessee be reversed and said circuit court ordered to grant a new trial to defendant.

LEWIS SHEPHERD,
CREED F. BATES,
JAS. H. BIBLE,
Att'ys for Thomas M. Montgomery.

Endorsed: No. #1379. In the U. S. circuit court at Chattanooga. United States against T. M. Montgomery. Assignment of errors. Filed 14 day of April, 1892. Henry O. Ewing, deputy clerk.

Bill of Exceptions.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

UNITED STATES
vs.
THOS. M. MONTGOMERY.

Be it remembered that at a trial of this cause the following testimony was introduced:

That the defendant did unlawfully take certain letters from the U. S. mail; that he was a railway postal clerk in the employ of the

Government at the time he took said letters; that the letters taken by defendant were "decoy" letters, or letters put into the
9 mails at Bristol, Tenn., by certain post-office inspectors, with fictitious names signed to them by said inspectors and addressed to "M. A. Dauphin, New Orleans, La."; that said letters contained money marked by said inspectors; that the money belonged to the inspectors, and that said letters and money were not intended to be delivered to said M. A. Dauphin, nor to be carried to New Orleans, La., but were in fact to be intercepted by the post-office inspectors who mailed them, and by them withdrawn from the mail, and that they were mailed by said inspectors for the purpose of catching, entrapping, and detecting defendant and for no other purpose; that said letters mailed by said inspectors at Bristol were by said inspectors taken out of defendant's valise at Chattanooga, Tenn.

The court, amongst other things not excepted to, charged the jury as follows:

"That if the proof showed that said letters — put into the U. S. mails and were unlawfully taken therefrom by defendant, it was a violation of law and the defendant would be guilty, no matter who mailed the letters nor to whom they were addressed or were to be delivered, nor whether they were 'decoy' letters or not.

That if the proof showed that the inspectors mailed the letters for the purpose of detecting defendant, and that the defendant did unlawfully take them from the mail, he would be guilty, even though the inspectors did intend to intercept and withdraw them from the mail before they reached the person to whom they were addressed."

To which the defendant duly excepted at the time.

The defendant by counsel requested the court to charge:

First. That as the proof showed that as the letters taken were mailed for the purpose of entrapping the defendant into the commission of a crime, that there could be no conviction of the
10 *the* defendant for the taking of said letters.

Second. As the uncontradicted proof showed that said letters were not intended to be forwarded to said M. A. Dauphin, as mailed, but were intended as "decoy" letters; therefore this was a fatal variance with the charges in the indictment, and the defendant should be acquitted.

Third. That if the proof showed that the money and letters thus mailed belonged to the inspectors who mailed them, and were to be intercepted and withdrawn from the mails by them before they reached M. A. Dauphin, that this is a fatal variance with the allegations and charges in the indictment, and that the defendant should be acquitted.

Which requests the court refused to charge; to which action of the court the defendant duly excepted at the time.

The court having overruled defendant's motion for a new trial, the defendant tenders this his bill of exceptions in this cause in open court to the judge presiding, when the court signed and sealed it and allowed the same, and ordered it to be filed as the

bill of exceptions, and orders and directs that the same be made a part of the record in this cause.

This the 13th day of April, 1892.

D. M. KEY, *Judge, &c.*

Endorsed: No. # 1379. In the U. S. circuit court at Chattanooga. United States against T. M. Montgomery. Bill of exceptions. Filed 14th day of April, 1892. Henry O. Ewing, deputy clerk.

11 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern division of the eastern district of Tennessee, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States and T. M. Montgomery, a manifest error hath happened, to the great damage of the said T. M. Montgomery, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday in October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of April, 1892, in the year of our Lord one thousand eight hundred and ninety-two.

[COURT SEAL.] HENRY O. EWING,
Deputy Clerk of the Circuit Court of United States for the Eastern District of Tennessee.

(Endorsed:) Filed 14th day of Apr., 1892. Henry O. Ewing, deputy clerk.

12 *Citation.*

The United States of America to H. B. Lindsay, United States district attorney for the eastern district of Tennessee:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in Washington on the first Monday of October next, pursuant to an appeal filed in the clerk's office of the United States circuit court for the southern

division of the eastern district of Tennessee, at Chattanooga, Tenn., wherein Thos. M. Montgomery is a plaintiff in error and The United States is defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable D. M. Key, judge, etc.
This April 13, 1892.

D. M. KEY,
Judge, etc.

Citation waived; service thereof duly acknowledged and accepted.
This April 13th, 1892.

H. M. WILTSE,
Ass't U. S. Attorney.

Endorsed: No. #1379. In the U. S. circuit court at Chattanooga. United States against T. M. Montgomery. Citation. Filed April 14th, 1892. Henry O. Ewing, deputy clerk.

13 Be it remembered that — a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within said district and the sixth circuit, on the 1st Monday, it being the 7th day, of April, A. D. 1890—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were *held*, to wit:

FRIDAY, *April 11th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

The grand jury in a body returned into open court and by their foreman, J. S. Matthews, returned and delivered the following, to wit:

A bill of indictment against T. M. Montgomery for violation of the postal laws, endorsed by their foreman, a true bill.

THE UNITED STATES
vs.
T. M. MONTGOMERY. } No. #1379. V. Postal L.

Came the defendant and his sure*ties*, Henry Joseph, and acknowledged themselves indebted to the United States in the sum of one thousand dollars, to be levied of their goods and chattels, lands and tenements, to the use of the United States; yet to be void if the above-bound defendant shall make his personal appearance before this court on the 1st Monday of October next, to answer the indictment against him, and does not depart the court without leave. Whereupon the cause is continued, on application of defendant, — next term of the court.

Be it remembered that — a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within said
14 district and the sixth circuit, on the first Monday, it being the 6th day, of October, 1890—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

THURSDAY, *October 16th*, 1890.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

THE UNITED STATES *vs.* T. M. MONTGOMERY. } No. # 1379. V. Postal Laws.

Defendant in this cause having filed a bond for his appearance at the next term of this court, this cause is continued upon application of defendant.

Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 6th day, of April, A. D. 1891—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

WEDNESDAY, *April 15th*, 1891.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

15 THE UNITED STATES *vs.* T. M. MONTGOMERY. } No. # 1379. Violation Postal Law.

Came the United States attorney and the defendant in proper person, who, having heard the indictment read, for plea says he is not guilty in manner and form as charged therein; and of this he puts himself upon the country; and the district attorney doth the like; and thereupon came the following jury, to wit:

J. S. Hixon, H. J. Parker, W. H. Wilson, R. G. Cannon, John Corbett, Marion Wafford, G. W. King, W. H. Howard, John Howard, Tyler Hayes, W. A. Cannon, and M. R. Thurman, good and lawful men, citizens and freeholders of the southern division of the eastern district of Tennessee, who, being duly elected, tried, and sworn to try the issue joined between the parties, who, not having heard the

charge of the court, are from rendering a verdict respited until tomorrow morning.

THURSDAY, *April 16th*, 1891.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

UNITED STATES
vs.
T. M. MONTGOMERY. } No. #1379. Violation Postal Laws.

Came the United States attorney and the defendant in proper person; again came also the same jury, to wit:

J. S. Hixon, H. J. Parker, W. H. Wilson, R. G. Cannon,
16 John Corbett, Marion Wafford, G. W. King, W. H. Howard, John Howard, Tyler Hayes, W. A. Cannon, and M. R. Thurman, who on yesterday, not having heard the charge of the court, were from rendering a verdict respited until today and who now upon their oaths do say that they cannot agree, and by consent a juror is withdrawn from the panel and a mistrial entered.

Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of Tennessee, at the court-house, in the city of Chattanooga, within the said district and the sixth circuit, on the first Monday, it being the fifth day, of October, A. D. 1891—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

WEDNESDAY, *October 7th*, 1891.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States court for the eastern district of Tennessee.

THE UNITED STATES
vs.
T. M. MONTGOMERY. } No. #1379. V. Postal Law.

Came the defendant and his sureties, John Trunk and S. R. Stegall, and acknowledged themselves indebted to the United States in the sum of one thousand dollars, to be levied of their goods and chattels, lands and tenements, to the use of the United States; yet to be void

if the above-bound T. M. Montgomery shall make his ap-
17 pearance before this court on the first Monday of April next to answer the indictment in this cause and does not depart the court without leave.

Thereupon the cause is continued on application of plaintiff.

Be it remembered that at a circuit court of the United States began and held for the southern division of the eastern district of

Tennessee, at the court-house, in the city of Chattanooga, within said district and the sixth circuit, on the 1st Monday, it being the 4th day, of April, A. D. 1892, the following proceedings were had, to wit:

Present and presiding: The Honorable D. M. Key, United States district judge for the eastern and middle districts of Tennessee.

WEDNESDAY MORNING, *April 6th*, 1892.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, United States district judge for the eastern and middle districts of Tennessee.

THE UNITED STATES *vs.* T. M. MONTGOMERY. } No. #1379. V. Postal Law.

Came the United States attorney and the defendant in proper person, who, having heard the indictment read, for plea says he is not guilty in manner and form as charged therein; and of this he puts himself upon the country; and the district attorney doth the like; and thereupon came the following jury, to wit, E. M. Cleveland, John Selvige, John P. Hale, E. J. Price, R. V. Pierce, R. A. Lowry, J. L. Hoge, J. M. Stewart, W. F. Hipp, J. A. Dotson, L. Rose, J. W. Majors, good and lawful men, citizens and freeholders of the southern division of the eastern district of Tennessee, who being duly elected, tried, and sworn to try the issue joined between the
18 parties, who, not having heard all of the evidence, the argument of counsel, or the charge of the court, are from rendering a verdict respited until tomorrow morning.

THURSDAY MORNING, *April 7th*, 1892.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

THE UNITED STATES *vs.* T. M. MONTGOMERY. } #1379. Violation Postal Law.

Came the United States attorney and the defendant in proper person; again came also the same jury, to wit:

E. M. Cleveland, John Selvidge, John P. Hale, E. J. Price, R. V. Pierce, R. A. Lowry, J. L. Hoge, J. M. Stewart, W. F. Hipp, J. A. Dotson, L. Rose, J. W. Majors, who on yesterday were from rendering a verdict respited until today, and who now upon their oaths do say that they find the defendant guilty in manner and form as charged in the indictment.

TUESDAY MORNING, *April 12th*, 1892.

Court met pursuant to adjournment.

Present and presiding: The Hon. D. M. Key, United States district judge for the eastern and middle districts of Tennessee.

THE UNITED STATES
vs.
T. M. MONTGOMERY. } No. 1379. Violation Postal Laws.

The defendant in this cause having on a former day of the present term of this court been found guilty in manner and form as charged in the indictment, it is considered by the court that for his
19 said offense the defendant pay the costs of this cause, for which let execution issue, and that he be confined at hard labor for two (2) years from this date, in the penitentiary at Columbus, Ohio, whither the marshal will convey him as soon as practicable.

Thereupon the defendant moved the court for a new trial of this cause; which, being considered by the court, is overruled and disallowed.

THURSDAY, *April 21st*, 1892.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, United States district judge for the eastern and middle districts of Tennessee.

THE UNITED STATES
vs.
T. M. MONTGOMERY. } No. 1379. Violation Postal Laws.

Came the defendant and his surety, Miss Margaret H. Bard, and acknowledged themselves indebted to the United States in the sum of two thousand dollars ($2,000.00), to be levied of their goods and chattels, lands and tenements, to the use of the United States; yet to be void if the said T. M. Montgomery shall appear before this court on the 1st Monday in April, 1893, to abide by and perform and undergo whatever judgment or sentence may be pronounced or may have been pronounced against him in this cause or abide by and perform such other order as the court may make in the cause, and not depart the court without leave.

THE UNITED STATES
vs.
T. M. MONTGOMERY. } No. 1379. Violation Postal Laws.

20 The defendant presented his bill of exceptions, which is signed and sealed by the court and ordered to become a part of the record. The defendant also presented his petition for a writ of error to take this cause to the supreme court; to which petition is attached an assignment of errors. Said petition and assignment of errors are hereby ordered to become a part of the record in this cause, and the clerk is hereby directed to file the same. Said wri

of error, as prayed for in said petition, is hereby granted and it will be issued by the clerk, citation having already issued and having been returned and it appearing that the district attorney has acknowledged service thereof. The defendant will be admitted to bail pending these proceedings upon the execution by him of a recognizance, with good and solvent surety to be approved by the judge presiding in this court, in the penalty of two thousand dollars, conditioned to be void if the said Thos. M. Montgomery shall appear before this court on the 1st Monday in April, 1893, to abide by and perform and to undergo whatever judgment or sentence may be pronounced or may have been pronounced against him in this cause, or abide by or perform such other order as the court may make in the cause, and not depart the court without leave.

The clerk will make out, in the time and manner prescribed by law, a full, true, and perfect transcript of the record in this cause and certify the same to the clerk of the supreme court, under the seal of this court, upon defendant paying clerk's fees for the transcript.

21 UNITED STATES OF AMERICA, } ss:
Eastern District of Tennessee, Southern Division, }

I, Henry O. Ewing, deputy clerk of the United States for the district aforesaid, do hereby certify the foregoing twenty (20) pages to be a full, true, and perfect copy of the record and proceedings made in the said court in the case wherein The United States is plaintiff and T. M. Montgomery is defendant, No. 1379, as the same appears of record and on file in my office.

Witness my hand and the seal of the said court, at Chattanooga, Tennessee, this 7th day of June, 1892.

{ The Seal of the United States Circuit Court, Southern Div'n, District of East. Tenn. }

HENRY O. EWING,
Deputy Clerk.

Endorsed on cover: Case No. 15,204. E. Tennessee C. C. U. S. Term No., 186. T. M. Montgomery, plaintiff in error, *vs.* The United States. Filed November 14th, 1892.

Supreme Court of the United States.

T. M. MONTGOMERY	No. 186.
vs.	In the Supreme Court of the
UNITED STATES.	United States.

Brief for Plaintiff in Error.

Plaintiff in error was convicted under Rev. Stat. 5467 for embezzlement while an employe in the railway, mail service between Bristol and Chattanooga.

The articles taken were letters addressed to M. A. Dawphin & Co., New Orleans, La., and containing money.

The indictment contained two counts, each, however, charging an offense under Rev. Stat. 5467. The first count after describing one of the letters, continues, "And which had been deposited in the mail at, as stated heretofore and intended to be conveyed in the mail and delivered to the person to whom it was addressed."

The second count says of the letter described in it, "which had been intrusted to him and which had come into his possession to be conveyed by mail and to be delivered to the persons addressed."

The evidence shows that none of the letters were intended to be delivered to M. A. Dawphin & Co., to whom they were addressed. But all of them had been deposited in the mail by the post office inspectors to catch plaintiff in error. It was not intended by the inspectors that these letters should ever be delivered, but that they should be intercepted at Chattanooga and, if not previously taken by plaintiff in error, then taken from the mails.

On the trial counsel for plaintiff in error requested the court to charge that there was a fatal variance between the indictment and the evidence as above indicated.

This was refused and plaintiff in error excepted.

The only question now open is upon the assignment of error based on this request and the action of the court on it, viz: Can there be a conviction upon Rev. Stat. 5467 where it is shown that the letters stolen were not intended to be delivered to the parties to whom they were addressed, but were intended to be intercepted and taken from the mails before reaching their apparent destination.

This question was referred to, but not determined in the recent case of Goode *vs.* United States, 159, U. S. 671.

In that case, however, the court said, to make a case under this statute it is necessary for the government to prove, among other things, "that the letter he is charged with secreting, embezzling or destroying, was intrusted to him or came into his possession, and was intended to be conveyed, carried or delivered by carrier, etc."

The point in the present case is that the stolen letters were not intended to be conveyed by mail.

In the language of the bill of exceptions, they were mailed by the inspector "for the purpose of catching, entrapping and detecting defendant and for no other purpose."

Section 5468 does not bring this case within the statute. It makes the fact of depositing a letter in the mails merely *prima facie* evidence of an intention that it shall be conveyed by mail—not conclusive evidence. And in this case the government itself has rebutted the presumption this raised.

This is the construction put upon Section 5468 by Mr. Justice Harlan at Circuit.

United States *vs.* Matthews, 35 Fed. Rep., 891.

There is no holding of this court in conflict with it.

We insist that in face of the testimony of the inspectors that they deposited the letters not for the purpose of being conveyed by mail, the instruction asked for ought to have been given, and that there is no evidence to sustain the indictment.

LEWIS SHEPHERD,
CREED F. BATES,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1895.

T. M. MONTGOMERY, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 186.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

T. M. MONTGOMERY, PLAINTIFF IN error,
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} No. 186.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

BRIEF FOR DEFENDANT IN ERROR.

This short record raises only one substantial question, namely, whether the defendant, a railway postal clerk, can be convicted for stealing a decoy letter.

The case is submitted upon the authority of *Grimm* v. *United States*, 156 U. S., 604; *Goode* v. *United States*, 159 U. S., 663; *Rosen* v. *United States*, 161 U. S., ——.

EDWARD B. WHITNEY,
Assistant Attorney General.

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TRANSCRIPT OF RECORD.

162-411-415-417

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 199.

T. J. BRYAN, APPELLANT,

vs.

M. W. KALES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED DECEMBER 8, 1903.

(19,228.)